Supreme Court of the United States

OCTOBER TERM, 1952

No. 341

WILLIAM POULOS, APPELLANT,

vs.

THE STATE OF NEW HAMPSHIRE

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

REPLY BRIEF FOR APPELLANT

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Counsel for Appellant

STATUTES CITED

MISCELLANEOUS CITATIONS

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MAY IT PLEASE THE COURT:

The argument of the appellee boils down to two propositions:

(1) New Hampshire has in the past been fair in dealing with the civil liberties of Jehovah's witnesses and, therefore, it must be presumed that the judgment of the court below is fair and constitutional in this case;

(2) the burden of certiorari, as a condition precedent to the exercise of civil liberties in this case, is so inconsequential that there is no violation of the First and Fourteenth Amendments.

I.

The State of New Hampshire is to be commended for the fine record that its Supreme Court has made in the field of civil liberties. Its maintenance of calm weather and a mild climate for Jehovah's witnesses when plagued throughout the nation for their refusal to salute the flag (while this Court had not yet done so) is noteworthy. It stood on the same level with the New York Court of Appeals and the Supreme Court of Illinois in refusing to go along with approval of abridgment of liberty through the license tax by this Court. Also the New Hampshire Supreme Court distinguished itself by not enforcing the child labor law to worship by minors of Jehovah's witnesses, when this Court approved the same. Compare In re *Lefebvre*, 91 N. H. 382, 20 A. 2d 185 (1941), with *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940). But the holding in *Barnette* v. *West Virginia State Board of Education*, 47 F. Supp. 251 (1942), was more outstanding. Compare also *People* v. *Barber*, 289 N. Y. 378, 46 N. E. 2d 329 (1943); and *City of Blue Island* v. *Kozul*, 379 Ill. 511, 41 N. E. 2d 515 (1942) (on motion for rehearing by the City of Blue Island), where the courts refused to follow *Jones* v. *City of Opelika*, 316 U. S. 584 (1942), reversed at 319 U. S. 103. See and also compare *State* v. *Richardson*, 92 N. H. 178, 27 A. 2d 94 (1942), with *Prince* v. *Massachusetts*, 321 U. S. 158 (1944).

Notwithstanding the good reputation of the Supreme Court of New Hampshire and regardless of its fine record in the field of civil liberties, it must be judged according to the present and not the past. Even persons with good reputations and characters can go wrong. Also courts are not immunized from error by their past records. It is human to err. This Court will determine the correctness of the decision in this case by what has happened here and not according to what the Supreme Court of New Hampshire

has done in previous civil liberties cases involving Jehovah's witnesses.

It is obvious that the fine record of the court below has been marred by its abberation in this case. The purpose of the appeal in this case and the arguments made by the appellant in this Court, therefore, are to show the Court the error into which the court below has fallen and help this Court to pull the court below out of the ditch and back upon the straight and narrow path of rectitude it made for itself in this field of law in the past.

II.

Since the appellee has made no effort at all to answer one prong of the argument of the appellant (whether relegating the broadcaster of ideas in the parks of the state to the civil remedies of certiorari and mandamus as a condition precedent to the exercise of his civil liberties is an *expensive* and *costly burden* upon rights guaranteed by the Constitution, thereby abridging the rights) appellant will not argue further on that feature of the point. It is amply covered in the main brief.

However, the argument of the appellee that the remedy of certiorari in the state is so speedy that it cannot be a delayed time burden to speakers or the people desiring to exercise their constitutional rights must be replied to.

While it was intimated by the court below in its opinion that the writ of mandamus may be available as a remedy, it seems plain from the decisions that mandamus cannot be resorted to. (See *Storer Post* v. *Page*, 70 N. H. 280, 47 A. 264, and *Hart* v. *Folsom*, 70 N. H. 213, 47 A. 603.) However it is true that the remedy of certiorari may be resorted to. That remedy is fraught with dangerous procedural technicalities of the common law writ of certiorari. It is also a discretionary remedy. *Dinsmore* v. *Mayor and Aldermen*, 76 N. H. 187, 191, 81 A. 533. No issue of fact can be inquired into under the writ. (*Cloutier* v. *Milk Con-*

trol Board, 92 N. H. 199, 203, 28 A. 2d 554.) It was also held in the *Cloutier* case, *supra*, that the inquiry on certiorari is limited to jurisdictional and law questions only. Where there is a remedy by appeal the writ of certiorari will not be granted.—*Waisman* v. *Board of Mayor and Aldermen*, 96 N. H. 50, 69 A. 2d 871; *Willis* v. *Wilkins*, 92 N. H. 400, 32 A. 2d 321; *Barker* v. *Young*, 80 N. H. 447, 119 A. 330.

In *Grand Trunk Railway Co.* v. *Berlin*, 68 N. H. 168, 170, 36 A. 554, the Supreme Court of New Hampshire states that "The writ is not awarded as a matter of right, and is withheld where substantial justice has been done or the party has another remedy that is ample and convenient". (See also *Logue* v. *Clark*, 62 N. H. 184.) *Moffett* v. *Gale*, 92 N. H. 421; 32 A. 2d 526, and *Leighton* v. *Concord & Montreal Railroad*, 72 N. H. 224, 231, 55 A. 938, held that certiorari is entirely discretionary.—Compare *N. H. Racing & Breeding Association* v. *N. H. Racing Commission*, 94 N. H. 156, 48 A. 2d 472.

Since the judicial inquiry by certiorari is limited to the record made before the administrative agency and no new evidence *de novo* may be received, and, inasmuch as the City Council of Portsmouth is not a court of record, it is obvious that the ordinary layman, seeking to get a permit to hold a meeting in the park, would find himself in a very difficult position in a court on certiorari sans a record sufficient to properly present the question of constitutional law to this Court. To protect himself he would need a lawyer to represent him in applying for a permit. The remedy, for all practical purposes, is a remedy in name only.

The appellee equivocally attempts to lead this Court to believe that the appellant has the speedy and absolute right to go directly into the Supreme Court of New Hampshire in an original action for the writ of certiorari against the city council. This is a specious argument. When scrutinized more closely, bringing original proceedings in

the court below is seen to be an elusive and risky step to take. Section 2 of Chapter 360 of the Revised Laws of New Hampshire of 1942, defining the jurisdiction of the Supreme Court of New Hampshire, uses the word "may" in connection with the issuance of the writ. That section of the statute indicates the issuance of the writ in original proceedings is purely discretionary. Moreover, it appears from a reading of the statute that the court may limit the issuance of the writ to the exercise of appellate jurisdiction.

Certainly there is nothing in the statute that would preclude the court from following the usual practice of all other state appellate courts (especially courts of last resort) in requiring an applicant first to apply to some lower court for the writ. In the state of New Hampshire, while there is no Supreme Court decision commanding the procedure, it seems to be the practice for the seeker of the writ of certiorari to go first to the Superior Court. The usual appeal procedure then is followed by transferring the case through bill of exceptions to the Supreme Court of the State for review. That was the procedure followed in *Dinsmore v. Mayor and Aldermen*, 76 N. H. 187, 81 A. 533, and the majority of other certiorari cases.

The rule of making the applicant first apply to the Superior Court and then come to the Supreme Court of the State by way of exceptions seems to be uniform, especially in all proceedings for the writ against local administrative agencies. Very few, if any, original proceedings for the writ of certiorari in the Supreme Court of New Hampshire against a city can be found in the reports. All of the original writs that have been issued by the Supreme Court of New Hampshire against a city are in election cases. Original proceedings in the Supreme Court of New Hampshire in election cases are authorized by special statute. See for example *Daniel v. Gregg and Fuller*, 91 A. 2d 461 (1952), where the original proceeding was authorized by Section 27 of Chapter 42 of the Revised Laws of New Hampshire

of 1942. The statute does not help the political speech-maker against the denial of permits to talk in the parks during a campaign. It is limited to proceedings disqualifying a candidate.

Section 6 chapter 370 of the Revised Laws of New Hampshire confers jurisdiction on the Superior Court, the court of general jurisdiction in the state. That court must take cognizance of all cases that are not specifically provided to be brought in other courts. While the Supreme Court may (if it chooses) issue an original writ to a local administrative body, it seems that the New Hampshire practice is to let proceedings for certiorari against these boards be brought in the Supreior Court. This is the usual custom in practically all of the forty-eight states, as has been said. The states that permit these original writs in their highest courts are indeed very few. The New Hampshire practice, therefore, seems to be in conformity with the procedure in the majority of the states.

In *Nelson* v. *Morse*, 91 N. H. 177, 16 A. 2d 61, it is stated that "The authority to issue writs of certiorari is understood to be original in concurrence with that of the Superior Court, as well as appellants from that Court or in the tribunal exercising judicial functions, while the original authority of this Court will be exercised only sparingly and in exceptional cases where it is exercised by the Superior Court and causing undue hardship".

This Court ought not to permit itself to be misled by the specious argument that the writ of certiorari is a speedy and efficient remedy. Even though it may doubtfully be said to be speedy (through an original action in the Supreme Court of New Hampshire), still it is a burden and an abridgment to compel the citizen, armed with the First and Fourteenth Amendments, to resort to certiorari as a condition precedent to the exercise of civil liberties. It is, to say the least, a denial of due process of law to permit the State of New Hampshire to forfeit the right of the appel-

lant to challenge the validity of the law in these particular criminal proceedings. Why?

It should be remembered that the Supreme Court of New Hampshire permitted Jehovah's witnesses to challenge the constitutionality of the statute (identical to this ordinance) as construed and applied to the facts and enforced by the local authorities of the City of Manchester in *State* v. *Cox*, 91 N. H. 137, 16 A. 2d 508, affirmed *Cox* v. *New Hampshire*, 312 U.S. 569. On a factual stipulation identical to the facts proved in this case the court considered the validity of the law as enforced and construed and applied in this case and held it to be valid. (*State* v. *Derrickson*, 97 N. H. 91, 81 A. 2d 312.) This action by the court and the consideration of the question in *State* v. *Cox*, 91 N. H. 137, 16 A. 2d 508, led the appellant to believe that he had the right to challenge the validity of the ordinance in these proceedings and that the rule of *State* v. *Stevens*, 78 N. H. 268, 99 A. 723, did not apply. Resorting to the rule of *Stevens, supra,* as an afterthought by the court, when previously it had indicated that it did not apply in *Derrickson* (97 N. H. 91, 81 A. 2d 312), estops the court below from using *Stevens* as a trap for appellant and to avoid consideration of the same question in this case which it had considered in *Derrickson*. This Court, according to the Constitution, should administer equal justice under law and disregard the form, name and the technicalities of the Supreme Court of New Hampshire in this case and strike through to the substance of the case. Doing this requires that neither the motion to dismiss nor the motion to affirm should be granted.

After all is said and done by the appellee and the courts below, the Court ought to consider the labyrinth into which the argument advanced by New Hampshire would lead the Court. Even if the writ of certiorari, the only available writ in New Hampshire, is granted, where will the appellant be? Can appellant in that proceeding

challenge the constitutionality of the ordinance and raise the question in the state courts that is presented to this Court? Apparently the constitutionality of the ordinance cannot be challenged in New Hampshire courts even by way of certiorari. *Hart* v. *Folsom*, 70 N. H. 213, 217, 47 A. 603, 605, holds that one, applying for a permit or resorting to the administrative remedies of a regulatory statute such as this, may not challenge the constitutionality of the law thus submitted to. Unless this rule is limited or relaxed by the Supreme Court of New Hampshire, even if appellant should resort to the writ on another application for permit in the future, it would not help him. He would find himself blocked or trapped in the same shameful manner that he has been tried, convicted and punished here without the right to defend himself and urge his constitutional right.

The Court should not let itself be pushed onto the thin ice by the arguments of judicial convenience and procedural expedience urged by appellee. It should be remembered that appellant and his listeners in the park at Portsmouth together have the jointly shared right to hold a meeting and deliver and listen to a talk. This is guaranteed by the Constitution. The administrative regulatory procedure was pursued and exhausted. That was enough to appeal to this Court to protect the rights. Regardless of the fancy argument and fashionable relegating of appellant to the gauntlet of lawyers and judges, the question to be decided still remains: Does that suggested certiorari procedure, through burdens of time and expense, abridge the rights of the people guaranteed by the federal Constitution? Appellant says it does.

Considerations of municipal convenience by applying for a permit as a condition precedent to challenging the constitutionality of a law were rejected in *Lovell* v. *Griffin*, 303 U. S. 444, 452-453. The desirability of maintenance of order and the preservation of the rights of the municipality were found not to be sufficiently heavy to outweigh the

liberty of the press in *Schneider* v. *New Jersey*, 308 U.S. 147, 161-162, and *Thornhill* v. *Alabama*, 310 U. S. 88, 95-96, 97. Orderliness of judicial procedure and the availability of the writ of mandamus in Connecticut did not forfeit the right to challenge the validity of the law as construed and applied in *Cantwell* v. *Connecticut*, 310 U. S. 296, 305-306.

The appellee attempts to distinguish the holding of the Court in *Estep* v. *United States*, 327 U.S. 114, through suggestion that the writ of mandamus, certiorari and habeas corpus were not available to Estep before induction. The writs were not held not to be available to Estep. They were held not to be available in many cases where there was no exhausting of the administrative remedies by reporting for induction and refusing to submit as Estep had done. The denial of these exceptional remedies was on the grounds that the registrant failed to report for induction and exhaust his remedies. In cases where there has been an exhaustion of remedies by reporting and refusing to submit to induction there is no question that the exceptional civil remedies would have been available if quickly sought. (See Ex parte *Fabiani*, 105 F. Supp. 139.) The statement quoted from *Davis on Administrative Law*, at page 756, by the appellee should be accepted with the above-stated qualification.

What more can be said except that appellee's contentions should be rejected by this Court?

Wherefore it is submitted that the motion to dismiss or affirm should be denied, that jurisdiction should be noted, the judgment of the court below should be reversed and appellant discharged or, in the alternative, the case should

be remanded to the Supreme Court of New Hampshire for further proceedings not inconsistent with the opinion to be written herein.

Respectfully,

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and in complete accord with decisions of this Court. It correctly assessed the situation when it said:

> "'The issue which this case presents is whether the City of Portsmouth can prohibit religious and church meetings in Goodwin Park on Sundays under a license system which treats all religious groups in the same manner.'" *State* v. *Derrickson*, 97 N.H. 91, 95, 81 A. 2d 312, 315.

Indeed, the facts presented were insufficient and there was no need for a determination of "whether a city could prohibit religious meetings in all of its parks". The decision relied implicitly upon the unanimous affirmation which its previous opinion in *State* v. *Cox*, 91 N.H. 137, had been accorded by this Court in *Cox* v. *New Hampshire*, 312 U.S. 569, 85 L. Ed. 1049, 61 S. Ct. 762. It was further pointed out that the ordinance in question in the present litigation was identical to the one under consideration in the *Cox* case (*supra*).

It expressly recognized the previous construction that:

> "'The discretion thus vested in the authority [City Council] is limited in its exercise by the bounds of reason; in uniformity of method of treatment upon the facts of each application, free from improper or inappropriate consideration and from unfair discrimination. A systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways, is the statutory mandate. The licensing authority has no delegation of power in excess of that which the Legislature granting the power has and the Legislature attempted to delegate no power it did not possess. *State* v. *Cox, supra*'". *State* v. *Derrickson*, 97 N.H. 91, 93, 81 A. 2d 312, 313.

Nothing throughout its entire decision transgressed, modified or broadened the construction previously accorded the language of the ordinance and statute.